fell far short of "specific allegations which, if proven true, would have a probable impact on the election..."

On December 2, 2003, Battle filed with the trial court a motion for the court to reconsider its Decree of November 20, 2003, which denied her leave to file suit against the proposed respondents. With her motion to reconsider, Battle filed another Complaint which contained numerous specific allegations addressing Schaefer's eligibility and the conduct and result of the election of November 4, 2003, as required by Judge Martin. The motion and the Complaint was accompanied with an affidavit and a Memorandum In Support of Battle's Motion To Reconsider The Decree of November 20, 2003.

On December 3, 2003, Judge Martin entered a Decree, stating "The Court has reviewed the plaintiffs' motion for reconsideration. It is denied." On December 11, 2003, Battle filed a Petition For Writ Of Certiorari with this Court with regard the case of Battle v. Poston et al., Record No. 032348.

On December 12, 2003, Battle filed with the court a second motion for it to reconsider its Decree of November 20, 2003 and December 3, 2003, and, on December 15, 2003, it was denied.

On December 19, 2003, Battle filed her Notice of Appeal with the Clerk of the Norfolk Circuit Court, appealing the Decrees to the Supreme Court of Virginia, and on June 3, 2004, the Supreme Court denied Battle's petition to for appeal and access to its courts.

On December 24, 2003, Battle filed this suit in the United States District Court for the Eastern District, Norfolk Division("District Court"), stating that the respondents had violated her rights under the First, Fourteenth and Fifteenth Amendments to the United States Constitution, Section 5 and Section 10 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973 (a) (b) (c); Section 1983, 42 U.S.C.: 28 U.S.C. Sections 1343, 2201 and 2202. Complaint, paragraph 9.

She brought this suit against the Democratic Party of Virginia("Party"), Norfolk City Democratic Committee("Committee"), George Schaefer("Schaefer") and the Norfolk Electoral Board("Board") to enforce her rights as a voter and unsuccessful candidate. Complaint paragraphs 1, 40. As a voter, Battle voted in the City of Norfolk, at St. Andrews, Precinct No. 17, on November 4, 2003 around 5:30 p.m.; however, Board's records and final certified tallies from St. Andrews did not show that her vote was counted. Complaint, paragraph 79; Exhibit A, Affidavit of Sherry White-Battle and Exhibit B, St. Andrew's certified tallies; Plaintiff's Mem. In Opp'n p. 2; Affidavit of Feb. 17, 2004; 5-27-2004, Tr. 9-12. As an unsuccessful candidate, Battle also brought suit on behalf of her candidacy and voters in the City of Norfolk, who were unable to protect their votes, which were cast between the hours of 4:00 p.m. and 7.00 p.m. on November 4, 2003. Complaint, paragraphs 79-81, 84, 86, 89, 90, 93, 96, 115; 12-30-2003, Tr. 18-20. In her Complaint, she alleged that she complained to John R. Doyle, III, the Commonwealth's Attorney of the City of Norfolk, that Schaefer, Charlene Christopher("Christopher") the Chairperson of the Committee, Barbara Klear("Klear"), the Secretary of the Committee, and others conspired to violate her rights under Virginia law. She alleged that her rights under Section 5 and Section 10 of the Voting Rights Act of 1965, as amended, 42, U.S.C. 1973 (a) (b) (c) ("the Act") and the First, Fourteenth, and Fifteenth Amendments to the Constitution of the United States were violated. Complaint, paragraphs 9-10, 19-29, 30, 31, 112-124. On October 23, 2003, Battle testified under oath in the Norfolk Circuit Court that she attended the Federation of Civic Leagues meeting("meeting") which was held on October 9, 2003. Complaint, paragraph 35. Battle stated to those present at the meeting that Schaefer illegally conspired with a few-well connected politicians to steal the Democratic nomination, and Schaefer did not deny the truth of her statement. On October 23, 2003, Steve Mirman, the

Republican candidate for the Clerk of Court, who was present at the meeting with Battle and Schaefer, testified under oath that he witnessed Battle saying to those present that Schaefer illegally conspired with a few well-connected politicians to steal the Demoratic nomination and that Schaefer did not deny White-Battle's accusation. Complaint, paragraph 36.

The respondents, whether acting jointly or severally, were acting under the color of state law. Complaint, paragraph 10. Battle alleged that Schaefer, the Committee, including Christopher, Klear and others conspired to injure, prevent and hinder her in the free exercise or enjoyment of rights or privileges secured to her under the laws of Virginia. Complaint, paragraphs, 30-31.

On December 30, 2003, the District Court heard arguments from Battle and the respondents. Battle that, among other things, the respondents had violated her rights under Section 5 of the Act, 42 U.S.C. Sec. 1973c, when using a non-primary method. 12-30-2003, Tr. 5-6.

Battle argued that the Party's and the Committee's practices(or decisions or changes)of not providing notice when using a non-primary method of selecting of candidates; increasing payment from $500.00 to requiring a payment of $4,000.00 filing fee; and nominating candidates prior to the mandatory and statutory time, as prescribed in Section 24.2-510 of Virginia Code, violated the preclearance section of the Act. 12-30-2003, Tr. 5-6 See Morse, et al. v. Republican Party of Virginia, et al., 517 U.S. 186, 193-229(1996). Complaint, paragraphs 19-29, 30, 31, 112-124. She argued that, in Morse, this Court held that the Republican Party of Virginia's decision to exact the registration fee was subject to Section 5, which, among other things, prohibits Virginia and other jurisdictions from enacting or enforcing "any voting qualification or prerequisite... different from that in force... on" a specified date unless the change has been pre-cleared under the Act. Battle argued that she was never

afforded an equal opportunity to participate in the Party's and Committee's nomination process and election.

Battle argued to the District Court that the Board certifying Schaefer with 52 of the 55 precincts of the City of Norfolk omitting the counting of thousands of votes of citizens, who cast votes between the hours of 4:00 p.m. and 7:00 p.m. on November 4, 2003, violated her equal protection under the Fourteenth Amendment. 12-30-2003, Tr. 18-20.

Battle further argued that the public interest would be served by granting the injunction in that she had raised fundamental constitutional claims, including equal opportunity for registered voters to participate in the Norfolk political process under the Act. 12-30-2003, Tr. 5-6, 9, 12, 17. Furthermore, Battle argued that the citizens of Norfolk, who voted on November 4, 2003 between the hours of 4:00 p.m. and 7:00 p.m., interest will be served by having the District Court to make a judicial determination that their votes were counted on Election Day. 12-30-2003, Tr. 18-20.

Battle factual statements to the District Court were not disputed by the respondents, who were all present. 12-30-2003, Tr. 4. The record shows that the District Court specifically asked the resopondents' counsels whether they had any objections to Battle's presentation of the facts of her case, pursuant to Rule 65(b) of the Fed. R. Civ. P., and they had no objections. 12-30-2003, Tr. 5, 22. The record further shows that Battle submitted to the District Court and mailed to the respondents a Memorandum In Support Of Motion For Temporary Restraining Order And Preliminary Injunction and Affidavit of December 30, 2003 in which she, swore that "the facts alleged in her Complaint, which was filed on December 24, 2003 with the Clerk of Court of the United States District Court of the Eastern District of Virginia, Norfolk Division, were true to the best of her knowledge and information and belief." The respondents filed no objections or oppositions to Battle's memorandum and affidavit of December 30, 2003.

This case was appealed to the Court of Appeals, and Schaefer and the Board filed motions to dismiss for lack of jurisdiction. On April 30, 2004, the Court of Appeals dismissed the appeal, Sherry White-Battle v. Democratic Party of Virginia, et al., Record No. 04-1150.

Thereafter, Schaefer and the Board filed motions for summary judgment against Battle, and, on May 27, 2004, the District Court heard arguments from the parties. At the hearing, Battle again objected to the District Court hearing the case on the merits because it involved claims that some of the respondents failed to pre-clear changes in accordance with Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c; 5-27-2004, Tr. 8. The District Court responded, saying, "All right. Do you have any argument you wish to make regarding the merits of the claims?" 5-27-2004, Tr. 8.

Battle again stated that she was suing the respondents as a voter and unsuccessful candidate. 5-27-2004 Tr. 9-12. However, the District Court would not permit her to sue as a voter, but only as an unsuccessful candidate. 5-27-2004, Tr. 8; Order of June 29, 2004, p. 11.

At the improper urging and ordering of the District Court, the Party and the Committee filed Motions For Summary Judgment against Battle. On May 27, 2004, the District Court heard argument on the Motions For Summary Judgment and a Motion For Default Judgment filed by Battle.

On June 15, 2004, Battle filed a Motion For Leave To Amend Her Complaint with the District Court and the respondents filed their reply briefs.

On June 29, 2004, the District Court denied, among other things, Battle's Motion For Preliminary Injunction, and granted the Board's and Schaefer's Motions For Summary Judgment.

On November 10, 2004, the District Court granted the Party's and the Committee's Motions For Summary Judgment and denied Battle's Motion For Default Judgment.

On November 16, 2004, the District Court denied Battle's Motion For Leave To Amend without any explanation.

Battle appealed the District Court's Orders of June 29, 2004, November 10, 2004 and November 16, 2004, and, on June 21, 2005, the Court of Appeals affirmed the District Court's orders.

REASONS FOR GRANTING THE WRIT

1. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's And Other United States Courts of Appeals' Prior Rulings On The Right Of A Civil Litigant To Have A Case Heard By Three Judges.

The District Court lacked jurisdiction to rule on the merits of Battle's claims under Section 5 of the Voting Rights Act. Section 1973c of 42 U.S.C. provides, in pertinent part, that:

"... Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of the section 2284 of Title 28 and any appeal shall lie to the Supreme Court." (Emphasis added).

The Fourth Circuit has held that district court, sitting as a single judge, has no power to rule on the merits of claim alleging failure to pre-clear in accordance with Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. Backus v. Sears, 677 F. 2d 397(4th Cir. 1982). In the case at bar, the District Court ruled on the-merits of Battle preclearance claims. The Fifth Circuit has held that single judge only have the power to enter a TRO to preserve the status quo until a three-judge court can be convened to rule on the claim alleging a failure to pre-clear under Section 5 of the Act. Id.; See Pitts v. Cates., 536 F. 2d 56(5th Cir. 1976).

In the case at bar, the record clearly shows that the District Court did not directly address the issue of its lack of

jurisdiction under 42 U.S.C. 1973c. While the District Court declared that the Voting Rights Act is remarkably broad applying to "any state enactment which altered the election law of a covered State in even a minor way," it stated that, in determining Section 5 issues, a court must consider: (1) whether there was an enactment or administration;(2) of a "voting qualification or prerequisite to voting or standard, practice or procedure with respect to voting "that is different from pre-1964 or most recently precleared law" and (3) "whether the challenged alteration has potential for discrimination.(Emphasis added).

The District Court further found that the Plaintiff had not alleged a claim under Section 5 of the Voting Rights Act.

Section 5 of the Act, prohibits, among other things, Virginia and other covered jurisdiction from enacting, enforcing or administering "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 4, 1964 unless the change has been precleared by the Attorney General or a declaratory judgment is obtained from the U.S. District Court for the District of Columbia. 28 C.F.R. 51.1(Revised 7-1-2003).

The term "vote" or "voting" are used, as defined in the Act, to include "all action necessary to make a vote effective in any primary, special, or general election... or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." 28 C.F.R. 51.2.

The Federal Procedure For The Administration Of Section 5 of the Act ("Federal Procedure") provides, in pertinent parts, that "any change affecting voting, even though it appears to be minor or indirect... must meet the section 5 pre-clearance requirement." 28 C.F.R. 51.12.

The Federal Procedure provides, in pertinent parts, that changes affecting voting include, are not limited to, the

following examples: changes affecting the eligibility of persons to become or remain a candidate, to obtain a position on the ballot in the primary or general election or to become or remain holders of elective office. 28 C.F.R. 51.13(g) Any change concerning registration, balloting and the counting of votes. 28 C.F.R. 51.13(b). Any change affecting the right or ability of persons to participate in political campaigns. 28 C.F.R. 51.13(k)

In Morse et al. v. Republican Party of Virginia, et al. , 517 U.S. 186, 204 (1996), this Court, citing Allen v. State Bd. of Elections, 393 U.S., at 566-567, declared that Congress intended pre-clearance provisions of the Act to give "the broadest possible scope" and to reaching any state enactment which altered election law in even in minor way, and intent is to reach subtle as well as obvious ways, citing Pleasant Grove v. U.S., 479 U.S. 462(1967) and Presly v. Etowah County Comm'm, 502 U.S. 491, 501(1992). This Court pointed out that Section 5 is "expansive within its sphere of operation "and" comprehends all changes to rules governing voting. "This Court declared that it had "consistently construed the Act to require preclearance of any change in procedures or practices that may bear on the 'effectiveness' of a vote cast in any primary, special, or general election." Morse, p. 205. (Emphasis supplied). The Court further declared that rules concerning candidacy requirements and qualifications fall into this category because of their potential to "undermine the effectiveness of voters who wish to elect [particular] candidates." Id.

Federal Procedure(regulation) unambiguously privides that when a political party makes a change affecting voting, Section 5 requires preclearance if two conditions are satisfied: The change must relate to "a public electoral function of the party" and the party must be "acting under the authority explicitly or implicitly granted by a covered jurisdiction." Morse, p. 194

In the case at bar, the District Court incorrectly found that Battle had not alleged a claim under Section 5 of the Act

in that none of her complaints against the Party and the Committee involved a "change" in state laws, standards, or procedures, and the Court of Appeals erred in affirming its decision. However, its finding is clearly inconsistent with the holding in Morse and the Federal Procedure.

In Morse, this Court held, among other things, that the Republican Party of Virginia's decision to exact a $45 registration fee from convention participants should have been precleared. Morse, p. 194. The changes in Morse, like in this case did not involve changes in state law, but a decision to change standards, procedures or practices of the party. The purpose of preclearance is to prevent all attempts to implement discriminatory voting practices that change the status quo. Morse, p. 209-210.

Any change affecting voting, even though it appears to be minor or indirect... must be precleared. 28 C.F.R. 51.12; See Morse, p. 204. The District Court did not apply "the broadest possible scope" to reach or prevent voting practices that clearly changed the status quo, and its decision did not include a consideration of all changes to rules governing voting. Morse, p. 204.

With respect to Battle's claims against the Party and the Committee, the Court of Appeals erred in affirming the District Court's finding that Battle makes her claim as an unsuccessful candidate and not as a voter. Order of November 10, 2004, p.10. Battle's claims against the Committee and the Party involved changes which should have been precleared under Section 5 of the Act. Battle alleged that Schaefer, and the Committee, including Klear and Christopher, conspired to unlawfully obtain the democratic nomination of Schaefer before May 9, 2003, which was the earliest date that he could have been legally nominated by the Committee under Virginia Code Section 24.2-510. Plaintiff's Mem. Opp'n., p.9, Affidavit of February 17, 2004. Schaefer and these Committee's officers knew that notice of the time, place and method of selection were required to be given by the Party's Plan. They knew

that the Party's Plan required the Committee to give public notice of such in a newspaper of general circulation in the City of Norfolk. Complaint, paragraphs 24, 30, 31, 34; Battle's Motion To Alter Or Amend Judgment, pp. 1-4. While the Party's Plan required notice to be publish as such, the Committee made a decision to cancel or change the provision for notice to the public. Complaint, paragraph 12. The Committee's decision in nominating Schaefer, required interested persons, including Battle, to pay a $4,000.00 filing fee. Complaint, paragraph 28.

The Committee did not publicize the $4,000.00 filing fee requirement in the newspaper of general circulation. Plaintiff's Mem. Opp'n, p. 10, Affidavit of February 17, 2004. Battle's Motion To Alter or Amend Judgment, pp. 1-4.

Schaefer, who was the Chief Deputy Commonwealth's Attorney of the City of Norfolk, and these Committee's Officers knew that Virginia Code Section 24.2-510 provided the following prohibition. On November 8, 2004, Vendrick and Klear testified under oath that they were aware of the prohibition. On November 8, 2004, Vendrick and Klear testified under oath that they were aware of the prohibition. "In the case of all general elections a party shall nominate its candidates for any office by a non-primary method only within thirty-two days immediately preceding the primary date established for nominating candidates for the office in question."

The Committee's nomination of Schaefer on April 2, 2003, and Schaefer, the then Chief Deputy Commonwealth's Attorney for the City of Norfolk and former Chairman of he Norfolk City Republican Party, accepting the nomination knew that such nomination was unlawful in that a nominee was not to be selected no earlier that May 9, 2003. Complaint, Exhibit B, Plaintiff's Mem. Opp'n., p. 11, Affidavit of February 17, 2004. To circumvent the prohibition of Section 24.2-510, the Committee's Minutes of April 2, 2003 reads, in pertinent part, that "...George Schaefer was the only candidate to file by March 28, 2003

deadline. It was moved and seconded to cancel the caucus, declare George Schaefer the nominee as of May 9, 2003 and return the filing fee; the motion was passed unanimously " (Emphasis added). The minutes reflect that Schaefer was present at all relevant times at meetings leading to his nomination. Complaint, Exhibit B, Plaintiff's Mem. Opp'n., Affidavit of February 17, 2004.

The above described actions of the Committee conspiring with Schaefer, including the Party's endorsement of Schaefer as the Party's nominee, constitute changes under Section 5 of the of the Act.

The Federal Procedure provides that "any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary, or general elections or to become or remain holders of elective office" 28 C.F.R. 51.13(g). In the case at bar, all these of changes affected the eligibility of Battle to become a candidate for the clerk of court to obtain a position on the ballot in the November 4, 2003 General Election or to become a holder of elective office. "Any change affecting the right or ability of persons to participate in political campaigns which is effected by a jurisdiction subject to the requirement of Section 5." 28 C.F.R. 51.13(k). These changes by the Party and the Committee affected Battle's right or ability to participate in the political campaign as a democratic candidate. "Any change affecting voting of even though it appears to be minor or indirect... must meet the section 5 preclearance requirement." 28 C.F.R. 51.12.

In Morse, this Court was confronted with, among other things, the question of whether Section 5 of the Act required preclearance of the Republican Party of Virginia's decision to exact a $45 registration fee. Morse, p. 194(Emphasis supplied). This Court made it clear that the Republican Party of Virginia's decision to exact the registration fee was subject to Section 5 of the Act. Morse, p. 203. In the case at bar, the Court of Appeals incorrectly affirmed the District Court's finding that Battle had not

alleged a claim under Section 5, but under Section 2 of the Act, against the Party and the Committee.

Section 5 requires preclearance if two conditions are satisfied:

(1) the change must relate to a "public electoral function of the party" and

(2) the party must be "acting under authority explicitly or implicitly granted by the covered jurisdiction." Morse, p. 194; 28 C.F.R. 51.7. In the case at bar, the Party and The Committee's members were acting under the authority of 24.2-508, and 24.7-510 of the Code of Virginia and the Party Plan.

These claims with respect to the Committee and the Party clearly relate to a public electoral function of the Committee and Party, and they were certainly acting under the authority explicitly or implicitly granted by the laws of Virginia.

The District Court lacked jurisdiction to hear Section 5 claims on the merits, and it abused its discretion by overruling Battle's objection to it hearing the preclearance claims on the merits. The Court of Appeals affirming of the District Court's finding was inconsistent with this Court's and other courts of appeals' ruling.

II. The Petition Should Be Granted Because The Opinion Below Conflicts with This Court's and Other United States Circuit Courts of Appeals' Prior Rulings On The Rights Of A Civil Litigant To Sue As An Unsuccessful Candidate And As A Voter.

The Court of Appeals erred in affirming the District Court's finding that Battle lacked standing because she sued as an unsuccessful candidate and not as a voter. To the contrary, Battle brought this suit as a candidate and voter. Complaint, paragraphs 1, 40, 79-81. As a voter, Battle voted at St. Andrews, Precinct No. 17, in the City of Norfolk, on November 4, 2003, around 5:30 p.m.; however, the Board's

final certified tallies from St. Andrews do not show that her vote was counted. Complaint, paragraph 79. 12-30-2003, Tr. 18; Plaintiff's Mem. Opp'n., p. 2, Exhibit A, Affidavit of February 17, 2004; 5-27-2003, Tr. 9-12.

The Court of Appeals erred in affirming the Party's and the Committee's Motions for Summary Judgment. Battle agrees that a summary judgment is proper only "if the pleadings, deposition, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. CIV. P. 56(c); see also Miller v. Leathers, 913 F. 2d 1085, 1087(4th Cir. 1990). The fact and inferences drawn from the pleadings must be viewed in the light most favorable to the nonmoving party. Nguyen v. CNA Corp., 44 F. 3d 234, 237 (4th Cir. 1995). Summary judgment is appropriate when the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-49(1986). If the plaintiff and defendant dispute the facts of the case, "plaintiff's version of the fact must be presented where the parties' versions conflict, at least to degree that her allegations have support in affidavits, depositions or other documentary evidence." Magnuson v. Peak Technical Servs., 808 F. Supp. 500, 504 (E.D. Va. 1992) (citations omitted).

In the case at bar, there are genuine issues of material fact, among other things, especially with regard to Battle's vote not being counted at the St. Andrews, Precinct No. 17 by the Board. The District Court failed to draw facts and inference from the pleadings in the light most favorable to Battle. Battle's version of the facts must be presented since the parties' versions conflict, at least to the degree that her allegations have support in her affidavits, or other documentary evidence. The affidavits and documents support Battle's version of the facts with respect to her vote not being counted and that she is suing as a voter. Battle's

pleadings, together with her affidavits, show that there are genuine issues of material fact in dispute between the parties.

It is well establish that private parties may enforce Section 5 of the Act. Morse, p. 231; 28 C.F.R.C. 51.63. This Court, in Morse, declared that, although Section 2, like Section 5, provides no right to sue on the face, "the existence of the private right of action under Section 2... has been clearly intended by Congress in 1965." Morse, p. 232.

Secondly, the District Court should not have dismissed the suit for lack of standing because both candidates and voters may challenge on its face on equal protection grounds under the Fourteenth Amendment and its affects on their First Amendment rights. Mancuso v. Taft, 476 F. 2d 187, 190 (1st Cir. 1973). Walgren v. Bd. of Selectment of the Town of Amherst, 519 F. 2d 1,364(1st Cir. 1975) (A candidate has standing to raise constitutional rights of voters). This suit involved Battle's First, Fourteenth, and Fifteenth Amendment rights and rights of the voters of the City of Norfolk.

Thirdly, Battle may establish standing under Article III of the Constitution. She must show a distinct and palpable injury to herself caused by the challenged actions of the respondents. Alington Heights v. Metro. Housing Corp., 439 U.S. 252, 261 (1977); E.g., University of Calf. V. Bakike, 438 U.S. 265, 280 (1978). In the case at bar, Battle suffers a direct palpable injury by the respondents.

The Court of Appeals' support of the District Court's reliance on Roberts v. Wamser, 883 F. 2d 617(8th Cir. 1989) is misplaced in that the facts in Roberts are clearly distinguishable from the facts in this case. In Roberts, the suit was being challenged under Section 2, while Battle's suit, as an unsuccessful candidate and voter, is primarily based on Section 5 and 10 of the Act and the First, Fourteenth, and Fifteenth Amendment. Battle has standing to institute this suit as a voter under Section 5 of the Act.

III. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's And Other United States Courts of Appeals' Prior Rulings On The Question Of When Claims Are Moot Under Rule 15(a) of The Federal Rules of Civil Procedure.

The Court of Appeals erred in affirming the District Court's finding that Battle's requests to enjoin the certification and swearing in of Schaefer, for a declaratory judgment invalidating the election, and to issue an injunction requiring a special election were all moot against the Party and the Committee. Order November 10, 2004, pp. 5, 11. The District Court incorrectly decided that these issues were moot since the Board was still a party to the suit in that Battle filed, on June 15, 2004, an Amended Complaint in the District Court. Rule 15(a) of the Fed. R. Civ. P. provides, in relevant part, that "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served... Otherwise a party may amend the party's pleading only by leave of court... and leave shall be freely given when justice so requires..."

With respect to the Board, Battle is entitled to amend "once as a matter of course" because the Board had not filed an answer, a responsive pleading in this case. While the Board had filed a motion for summary judgment, the District Court and the Fourth Circuit have previously held that a motion for summary judgment is not considered a responsive pleading. Williams v. Wilkerson, 90 F. R. D. 168(E.D. Va. 1981); Coral v. Gonse, 330 F. 2d 997(4th Cir. 1964). It should be noted under Rule 15(a) Battle was not required to obtain leave from the District Court to file an Amended Complaint against the Board. Coral v. Gonse, supra. The Board is still a party in the suit. Thus, the District Court could have enjoined the certification and swearing of Schaefer, declare the election to be invalid, and require that a special election be held by the Board. The District Court

abused its discretion in not enforcing Rule 15(a) of the Federal Rules of Civil Procedure

IV. The Petition Should Be Granted Because The Opinion Below Conflicts with This Court's And Other United States Circuit Courts of Appeals' Prior Rulings That Administrative Exhaustion Is Not Required When It Would Be An Exercise Of Futility.

The Court of Appeals erred in affirming the District Court's finding that Battle failed to exhaust the administrative remedies available to her under the Virginia Democratic Party Plan("Party Plan"). The District Court relied on Brooks v. Arlington Hosp. Ass'n, 850 F. 2d 191(4th Cir. 1988), which is clearly distinguishable from the facts in this case. In Brooks, the Court of Appeals affirmed the District Court's grant of summary judgment against a doctor who failed to exhaust the remedies prescribed in a "contract" between him and a hospital.

In the case at bar there is no contract between Battle and the Party or the Committee. Hence, Brooks should not apply.

Battle complained to Klear, the Secretary of the Committee, about the lack of public notice and racial discrimination. Complaint, paragraph 19-20. She complained to Christopher, Chair of the Committee and member of the Party's Central Committee, orally and in writing about the unfair and arbitrary manner in which Schaefer was chosen. Complaint, paragraphs 21-22. Exhibit H. On June 3, 2003, Christopher acknowledged Battle's letter of complaint. Exhibit I.

On May 19, 2003, Battle sent a copy of this complaint of May 19, 2003 to The Honorable Lawrence H. Framme, III, State Chair, who never responded to Battle's complaint. Exhibit H and Exhibit B.

It is well settled that, if an administrative remedy is provided, the requirement of exhaustion presupposes that the

remedy is an effective one Marsh v. County Bd. of Roanoke County, 305 F. 2d 94(4th Cir. 1962). Quarles v. Phillip Morris, Inc., 271 F. Supp. 842(E.D. Va. 1967). Administrative remedies need not be pursued when to do so would be futile. Harris v. Cambell, 472 F. Supp. 51(E.D. Va. 1979). Mullins Coal Co. v. Clark, 759 F. 2d 1142(4th Cir. 1985); Skubel v. Fuoroli, 113 F. 3d 730(2d Cir. 1997).

This Court has held that a petitioner need not exhaust a remedy when its availability is entirely within an agency's discretion and the agency has no incentive to make it available. United States v. Williams, 514 U.S. 527(1995)

In the case at bar, Battle was not required to pursue her administrative remedies under the Party Plan, Article 5, Section 5.6. If she had done so, it would have been futile. Christopher and Klear, officers of the Committee and Christopher also a member of the Party's Central Committee, made it clear to Battle on May 16, 2003 and May 19, 2003 that the Committee nomination of Schaefer was final. Complaint, paragraphs 19-24, Exhibits H and I. On the same day, May 16, 2003, that Battle complained to Klear, the Committee certified Schaefer as its nominee to be placed on the November 4, 2003's ballot. Exhibit C. Thus, the Party and the Committee had no incentive to make the administrative remedy available to Battle. The letter of complaint to Christopher was sent to the Honorable Lawrence H. Framme, III who never responded. Exhibits H and B. The Party clearly had notice of Battle's complaints and had an opportunity to correct the problems, at a minimum, by suggesting that Battle grieve before the Party under the Party Plan before further litigating. Instead, the Party, through counsel representing the Party and the Committee, vigorously supported and defended the Committee's unlawful actions at the hearing held in the Norfolk Circuit Court on October 23, 2003. Note, the Party Plan does not even require Battle to exhaust her administrative remedies under the Party Plan since it provides, in pertinent part, that "[a]ny Democrat aggrieved

by such alleged discrimination may file a complaint with the Secretary of the Steering Committee..." Party Plan, Article 5, Section 5.6.(Emphasis added).

In the case at bar, the facts are similar to those in United States v. Williams in that the remedy availability was entirely within the discretion of the Party, and it certainly had no incentive to make it available to Battle.

Furthermore, it would have been futile for Battle to exhaust her administrative remedies under the Party Plan because the Party and the Committee knew the nomination, certification and election of Schaefer were nullities. Battle's Mem. Of Law In Support of Motion For Summary Judgment, pp. 5-6; Brief In Support of Motion To Alter Or Amend Judgment, pp. 2-10. It is clear from the record that the Committee failed to comply with Virginia's mandatory law, Section 24.2-510. Order of November 10, 2004, p. 10 (The District Court stated that "...The evidence that has been proffered reveals that the DPV at worst sat by while the NDC violated state law regarding the timing of nominations, as well or local and state party rules..." The Committee's failed to give notice of the meeting and of the $4,000 filing fee requirement, and it failed to have the legally required quorum to nominate and certify Schaefer as its nominee for the clerk of court. Battle's Mem. Of Law In Support of Motion To Alter Or Amend Complaint, pp. 4-5. On November 8, 2004, Klear testified under oath that the Committee had no quorums at the meetings in which Schaefer was nominated and certified. These nullities should not have been enforced by the Court of Appeals. Federal courts are bound to recognize and follow state mandatory laws under the Full Faith and Credit Clause of the United States Constitution.

V. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's And Other United States Courts of Appeals' Prior Rulings Of A Civil Litigant's Rights Under Section 1983.

The Court of Appeals erred in affirming District Court's finding that Battle proffered no evidence that would amount to a cognizable violation of a Constitutional right. Notwithstanding Battle's claims under the Fourteenth and Fifteenth Amendments and Section 5 and Section 10 of the Voting Rights Act, Battle has also alleged a claim under Section 1983 against the Committee and Schaefer. Battle's Mem. In Opp. To Motion For Summary Judgment, pp. 9-19.

Battle has alleged specific facts showing that the Committee conspired along with Schaefer to deprive her of the democratic nomination. Complaint, paragraphs 161-165.

Deposition testimonies of Marilyn Doheny("Doheny"), Baxter Vendrick ("Vendrick") and Barbara Klear("Klear") on November 8, 2004 provided sufficient evidence that the Committee, acting under authority delegated to it by Virginia, as prescribed in Section 24.2-509 of the Code of Virginia, as amended, or under color of law, conspired and deprived Battle of her rights under Section 1983.

Doheny, had been a member of the Committee for more than 20 years, Vendrick, the Executive Vice-Chair, and Klear, the Secretary of the Committee and an active member for over 30 years, testified under oath that they met with Schaefer in December, 2002, or January, 2003 and agreed to support Schaefer for the nomination for the Clerk of the Norfolk Circuit Court. 11-8-2004, Tr. 13, 14. Doheny called Carlos Howard, a committee member, to get him to support Schaefer by increasing the customary $500 filing fee to $4,000.00 to ensure Schaefer's nomination. 11-8-2004, Tr. 7-8. Schaefer, Doheny, Vendrick, Klear, and other Committee members, unlawfully conspired to support Schaefer's nomination.

At the Call To Nominate A Democratic Candidate For Clerk of Court, adopted on February 5, 2003, an unassembled caucus was announced, requiring, each person seeking to become the Democratic nominee for Clerk of Court, to file a Declaration Of Candidacy with the chairman

of the Committee, by certified check, $4,000.00 before 8:00 p.m. on March 28, 2003. Complaint, paragraph 30. The Call states that the Committee shall seek appropriate waivers from the Democratic Party regarding expediting the time frames required by the Party's Plan. Complaint, paragraph 41; Exhibit C. At the Call, Schaefer, who was present, on February 5, 2003, filed the Declaration Of Candidacy and certified check in the amount of $4,000.00 payable to Charlene Christopher, the Chairperson. Affidavit of Sherry White-Battle dated November 22, 2004. Vendrick testified that "nobody else filed, so as a member of the City Committee, I participated in the sense that I supported him. He was the only Democrat who applied or filed to run for the nomination." 11-8-2004, Tr. 29-30. While the Committee's deadline was March 28, 2003, Klear testified that, on February 5, 2003, there was no need for the Committee to seek a waiver, as mentioned in the Call, because "We had a nominee(Schaefer) and there was no need to seek a waiver regarding publication in the newspaper." (Emphasis added). 11-8-2004, Tr. 32. Regarding the caucus, Klear testified that "We didn't even set a date because we had only one person(Schaefer) file." (Emphasis added). 11-8-2004, Tr. 32.

A civil conspiracy can be established by showing a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. Hechler Chevrolet Inc. v. General Motor Corp., 230 Va. 396, 402(1985). A Conspiracy can be proved entirely by circumstantial evidence. Hampton v. Hanrahan, 600 F. 2d. 600, 621(7th Cir. 1971). Though the common design is the essence of the charge(conspiracy), it is not necessary to prove that the defendants come together and actual agreed, in terms, to have that design and to pursue it by common means, one performing one part and another part of the same, so as to complete it, with a view to attainment of the same object, the jury will be justified in the conclusion that they engaged in a

conspiracy to effect the object." Regina v. Murphy, 8 C & P 297, 310(1937)(Coleridge, J.) See Fisher v. U.S., 252 U.S. 239, 250(1919).

In the case at bar, Battle has alleged and has provided sufficient evidence to the Court of Appeals, showing that there was a combination of two or more persons(the Doheny, Vendrick, Klear, and Schaefer) or co-conspirators. The evidence clearly shows that there was some concerted action on the part of them not providing notice of the un-quorum meeting in which Schaefer was nominated, requiring a $4,000.00 filing fee, and knowingly and unlawfully nominating Schaefer before May 9, 2003. The nomination of Schaefer was clearly obtained by unlawful means. Klear's and Vendrick's testimonies under oath support this position. Also, the Committee certified Schaefer without the legal required quorum.

The leading case on Section 1983 conspiracies remains Adickes v. S. H. Kress & Co., 398 U.S. 144(1970). This Court, in reviewing the district court's order granting summary judgment, held that the mere presence of the police officer was sufficient to permit, an inference of conspiracy Id. at 149-150. "If the policeman was present, we think it would be opened to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and Kress employee had a meeting of the minds and thus reached understanding that the petitioner should be refused service Id. at 155. In the case at bar, the mere presence Vendrick and Klear(state actors acting under 24.2-509 of the Code of Va.), Committee's executive officers, and Schaefer presenting the $4,000.00 filing fee checked dated February 5, 2003 at the un-quorum meeting were sufficient acts to permit an inference of conspiracy. See Morse v. Republican Party of Va., 186 U.S. 186, 197(1996). The issue of conspiracy is open to a jury, in view of the sequence that followed. There is a genuine material issue of fact in dispute regarding the conspiracy.

Section 1983, 42 U.S.C., provides in pertinent parts, that:

"Every person, who under color of any statute, any State... subjects, or causes to be subjected, any citizen of the United States... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Accordingly, Battle's rights under Section 1983 were violated.

VI. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's And Other United States Circuit Courts of Appeals' Prior Rulings On The Essential Due Process Rights Of A Civil Litigant To Have Access To The Courts.

The Court of Appeals affirming District Court's not finding that Battle's case presented an exception to the Absention Doctrine. The District Court reliance on Hutchinson v. Miller, 797 F. 2d 1279, 1286(4th Cir. 1986), was misplaced since this case requires federal court intervention because of "patent and fundamental unfairness" that "erode the democratic process." Hutchinson(quoting Hendon v. N.C. State Bd. of Elections, 710 F. 2d 177, 182(4th Cir. 1983)).

While the District Court took note of the fact that Battle sought relief in the Norfolk Circuit Court, it failed to acknowledge the fact that the Norfolk Circuit Court and the Supreme Court of Virginia have denied her access to those courts. Order of November 10, 2004, p. 15. Battle's Mem. In Opp. To Motion For Summary Judgment Of The Democratic Party, pp. 18-19. It should be noteworthy that, while the Supreme Court of Virginia has denied Battle access, the District Court basically found that the Committee violated Virginia's mandatory law(Section 24.2-510 of the Va. Code), the Party Plan and its local rules. Order of November

10, 2004, p. 10. The Court of Appeals clearly ignored this fact.

Furthermore, this case clearly presents a case of "patent and fundamental unfairness" that " erode the democratic process" in that the nomination, certification and election of Schaefer were nullities of which require federal intervention, so Battle may have access to the court. Without federal intervention, Battle have no judicial relief.

This Court has long held that right of access to the courts is protected by the First Amendment. E.g. N.A.A.C.P. v. Button, 371 U.S. 415, 429-30(1963); California Transport v. Trucking Unlimited, 404 U.S. 508, 513(1972). The right to run for public office touches on two fundamental freedoms: freedom of individual expression and freedom of association. This Court, in N.A.A.C.P. v. Button supra. At 444, declared, among other things, that the petitioner's rights were protected under the First Amendment because the petitioner was engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity. This court, in California Transport v. Trucking Unlimited supra. At 513, held that the petitioners had the right of access to the agencies and courts to be heard on application sought by competitive highway carriers. That right is part of the right of petition protected by the First Amendment.

In the case at bar, the District Court violated Battle's First Amendment right of free speech and freedom of association, and thus denied her access to the courts of the Commonwealth of Virginia. The facts as contained the Statement Of The Case are incorporated herein by reference.

Accordingly, the Court of Appeals erred in affirming the District Court's decision not to intervene to give justice to Battle in her only judicial forum, the federal court. The invalid nomination and certification of Schaefer clearly present a case of "patent and fundamental unfairness" that "erode the democratic process."

VII. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's And Other United States Courts of Appeals' Prior Rulings On The Essential Rights Of A Civil Litigant To Freely Amend A Complaint Under Rule 15(a) Of The Federal Rules of Civil Procedure.

Rule 15(a) provides liberal practice in allowance of amendments to formal pleadings. Foman v. Davis, Executrix 371 U.S. 178(1962); Coral v. Gonse, 330 F. 2d 997(4th Cir. 1964); Manuel v. U.S., 846 F. Supp. 478(E.D. Va. 1994). In exercising discretion, it must appear that successive amendments are futile, offered in bad faith, prejudicial, or otherwise contrary to interest of justice. Ward Elec. Serv., Inc. v. First Commercial Bank, 819 F. 2d 496(4th Cir. 1964).

In the case at bar, the District Court's Order of November 16, 2004 does not provide any reasons for its decision. In Foman at 182, this Court held that Federal Rule 15(a) declares that leave to amend "shall be freely given when justice so requires," and denial of the motion without any apparent justifying reason was an abuse of discretion. As in Foman, the District Court gave no reason for its decision which was inconsistent with the spirit of the Federal Rules.

Battle clearly has a right under Rule 15(a) to file an Amended Complaint against the Board without leave of Court since she filed her Amended Complaint before the Board filed a responsive pleading in this case. The Board has never filed a responsive pleading in this case.

A party may amend the party's pleading once as a matter of course at anytime before a responsive pleading is served. Coral v. Gonse., supra. The District Court has previously held that, where a defendant had not file an answer to the plaintiff's original complaint, but rather filed a motion to dismiss, the plaintiff was not required to obtain leave of court before filing his amended complaint. Sohns v. Dahl, 392 F. Supp. 1208(W.D. Va. 1975).

VIII. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's And Other United States Circuit Courts of Appeals' Prior Rulings On The Essential Rights Of A Civil Litigant To Discovery.

The Court of Appeals erred in affirming the District Court's termination of Battle's discovery, while Battle was discovering relevant evidence showing that Schaefer and the Committee had conspired and violated her rights under Section 1983.

Rule 26(b)(1) provides that "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..." This Court has declared "This rules has been generously construed to provide a great deal of latitude for discovery." Harris v. Nelson, 394 U.S. 286(1969)

While the District Court was aware that Battle's depositions of Doheny, Vendrick, and Klear revealed that, among other things, the Committee nominated and certified Schaefer without the legally required quorum and notices, it, without reasonable notice, arbitrarily and unfairly cut off relevant discovery of these alleged co-conspirators, as permitted by Rule 26(b)(2).

Further, the District Court would not permit Battle to depose and subpoena highly relevant evidence from Schaefer and the Board. The District Court gave no prior notice and reasons for its cut off of discovery. Thus, it provided Battle with little latitude for discovery.

It is well settled that the federal rules contemplates the broadest discovery possible in search for the truth. U.S. v. Holley, 942 F. 2d 916(5 cir. 1991); Pierson v. U.S., 428 F. Supp. 384(DC Del 1977); Kline v. Martin, 345 F. Supp. 31(E.D. Va. 1972). In the case at bar, the Court of Appeals clearly rubber stamped the District Court's arbitrary and abusive action which stopped Battle's search for the truth and justice.

Respectfully submitted,

Sherry White-Battle
1225 Boissevain Avenue
Norfolk, VA 23507
(757) 622-2112
Petitioner Pro-se

APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOUTH CIRCUIT

No. 05-1087

SHERRY WHITE-BATTLE,

Plaintiff – Appellant,

Versus

DEMOCRATIC PARTY OF VIRGINIA; NORFOLK CITY DEMOCRATIC COMMITTEE,

Defendants – Appellees,

and

GEORGE SCHAFER; NORFOLK ELECTORAL BOARD,

Defendants,

versus

ELISA LONG, General Registrar of the City of Norfolk; EILEEN M. ADDISON,

Movants – Appellees,

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Henry Coke Morgan, Jr., Senior District Judge. (CA-03-897-2)

Submitted: May 27, 2005
Decided: June 21, 2005

Before TRAXLER, SHEDD, and DUNCAN, Circuit Judges.

Before TRAXLER, SHEDD, and DUNCAN, Circuit Judges.
Affirmed by unpublished per curiam opinion.

Sherry White- Battle, Appellant Pro Se. Stephen Edward Heretrick, Portsmouth , Virgina ; Robert Bryan Rigney, Protogyrou & Rigney, PLC, Norfolk, Virginia; Eileen M. Addision, Commonwealth Attorney's office, Yorktown, Virginia, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

Affirmed by unpublished per curiam opinion.

Sherry White-Battle, Appellant Pro Se. Stephen Edward Heretick, Portsmouth, Virginia; Robert Bryan Rigney; PROTOGYROU & RIGNEY; PLC; Norfolk, Virginia; Harold Phillip Juren, Deputy City Attorney, Norfolk, Virginia; Eileen M. Addison, COMMONWEALTH ATTORNEY'S OFFICE, Yorktown, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Sherry White-Battle appeals the district court's orders granting summary judgment to Defendants and denying her motions to amend and for discovery. See White-Battle v. Democratic Party of Virginia, No. CA-03-897-2 (E.D. Va. June 29 & Nov. 12, 2004). We have reviewed the record and find no reversible error. Accordingly, we affirm. In addition, we find no reversible error. Accordingly, we affirm. In addition, we find the district court did not abuse its discretion in denying White-Battle's motions to amend and for discovery. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

SHERRY WHITE-BATTLE,

PLAINTIFF,

v. CIVIL ACTION NO: 2:03CV897

DEMOCRATIC PARTY OF
VIRGINIA, et al.,
DEFENDANTS.

ORDER

This matter is before the Court on Defendant Democratic Party of Virginia's ("DPV") Motion for Summary Judgment(Doc. 63) and Defendant Norfolk Democratic Committee's ("NDC") Motion for Summary Judgment (Doc. 39). On November 3, 2004, the Court heard argument on the Motions for Summary Judgment. For the reasons set forth in this Order, the Court GRANTS DPV's Motion for Summary Judgment, and GRANTS NDC's Motion for Summary Judgment.

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On December 24, 2003, the Plaintiff filed a Complaint in this Court against the DPV, the NDC, George Schaefer("Schaefer"), and the Norfolk Electoral Board("the Board"). (Doc. No. 1). The Plaintiff alleges that this Court has federal question jurisdiction to consider violations of her

The facts are stated in the light most favorable to Plaintiff, and are not factual findings for any other purpose other than a ruling upon the instant motions.

First, Fourteenth, and Fifteenth Amendment rights, as well as Sections Five and Ten of the Voting Rights Acts of 1965, 42 U.S.C. § 1973(a), (b), (c), 42 U.S.C. § 1983, and 28 U.S.C. §§ 1343, 2201, 2202. (Compl. at ¶ 9).

This action arises out of the Plaintiff's failed attempts to become the Democratic nominee in the election for Clerk of the Norfolk Circuit Court (hereinafter, "Clerk"). On or about May 16, 2003, the Plaintiff filed a Certification of Candidate Qualification and additional papers with the General Registrar of the City of Norfolk, in order to qualify to be included on the November, 2003 ballot for Clerk. (Compl. at ¶11). The Plaintiff believed that the Committee would hold a caucus on May 31, 2003 to select a Clerk nominee. (Compl. at ¶13). On or about May 16, 2003, and as a result, the Plaintiff could not become the Committee's nominee. (Compl. at ¶13). On or about May 16, 2003, the Plaintiff learned that the Committee's nomination period ended on March 28, 2003, and as a result the Plaintiff could not become the Committee's nominee. (Compl. at ¶¶ 15-16, 19). The Plaintiff also learned that the Committee selected Schaefer as its nominee for the Clerk's election in the November, 2003 Commonwealth General Election. (Compl. at ¶¶ 16, 19). Schaefer had been an active member of the Republican Party, having previously served as the Chairman of the City of Norfolk Republican Party. (Compl. at ¶ 17). The Plaintiff contacted Barbara Klear("Klear"), Secretary for the Committee, who told the Plaintiff that there was no publication of a notice of caucus and did not state the date or location of the caucus. (Compl. at ¶ 19).

The Plaintiff objects to the selection process used to nominate Schaefer as the Committee nominee. First, the Plaintiff alleges that Schaefer's selection violated Va. Code Ann. § 24.2-510, because nominees were not to be selected prior to May 9, 2003, exactly 32 days before the primary date of June 10, 2003. (Compl. at ¶ 37). Second, the Plaintiff alleges that the Committee's selection meeting did not comply with Section 9.1 of the Virginia Democratic Party

Plan or Article IX B of the Committee's By-Laws, because the notice, if any, was not published in a newspaper of general circulation in the City of Norfolk, including the date, time, agenda, place, and address of the caucus/meeting. (Compl. at ¶ 38).

In Count I, the Plaintiff alleges violations of the Voting Rights Act of 1965 and the Fifteenth Amendment. Specifically, the Plaintiff claims that as an African American, she has the same right to run for public office and participate in the political process as white candidates, pursuant to the Voting Rights Act of 1965. (Compl. at ¶ 113). She further claims that the Defendants' actions constitute violations of her rights under the Voting Rights Act, 42 U.S.C. § 1973(a)-(c) and the Fifteenth Amendment to the United States Constitution. (Compl. at 114). The Plaintiff claims that the Defendants' actions were racially motivated to discriminate against and to exclude African-Americans from the position of Clerk. (Compl. at ¶ 115).

In Count II, the Plaintiff alleges that as an African-American, similarly situated as Schaefer, a white individual, she was denied equal protection of the law by the Defendants because of her race.(Compl. at ¶ 118).

In Count III, the Plaintiff alleges that the Defendants have violated her right to freedom of expression and association as protected by the First and Fourteenth Amendments to the United States Constitution. (Compl. at ¶ 122).

The Plaintiff requests the following relief: (1) a declaration that the Defendants, acting jointly and severally, violated her constitutional rights as alleged; (2) an injunction prohibiting the Defendnats from swearing in Schaefer to the position of Clerk; (3) a declaration that Schaefer's election as Clerk is invalid and void; and (4) an injunction ordering that a special election be held in conformity with Va. Code Ann. §§ 24.2-226, 227; (5) costs.

On December 30, 2003, the Court held a hearing on Plaintiff's Motion for a Temporary Restraining Order. The

Court denied Plaintiff's Motion for a Temporary Restraining Order. (Document No. 3). In doing so, the Court found that all factors weighed against issuing the temporary restraining order – e.g. presence of irreparable harm, balancing of harm to the parties, public interest, and likelihood of success on the merits. (Id.). On January 6, 2004, in the wake of the Court's decision, the Plaintiff filed a Motion for Preliminary Injunction. (Document No. 5). On January 27, 2004, the Board filed its Motion for Summary Judgment (Document No. 9). On February 2, 2004, Schaefer filed his Motion for Summary Judgment. (Document No. 15). Finally on April 7, 2004, the Plaintiff filed his a Default Judgment against the Party. (Document No. 28) Judgment on May 27, 2004). On May 27, 2004, the Court heard argument on the Motions for Summary Judgment and the Motion for Default Judgment. The Court DENIED Plaintiff's Motion for Preliminary Injunction, GRANTED the Norfolk Electoral Board's and George Schaefer's Motions for Summary Judgment, and DENIED Plaintiff's Motion for Default Judgment against the Democratic Party of Virginia.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper only "if the pleadings, depositions, answers, to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56 (c); see also Miller v. Leathers, 913 F. 2d 1085, 1087 (4th Cir. 1990). The facts and inferences drawn from the pleadings must be viewed in the light most favorable to the nonmoving party. Nguyen v. CAN Corp., 44F. 3d 234, 237 (4th Cir. 1995). Summary judgment is appropriate when the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-49(1986). If the plaintiff and defendant dispute the facts of the case, "plaintiff's version for the facts must be presented where the parties' versions Conflict, at least to the degree that her allegations have

support in affidavits depositions or other documentary evidence." Magnuson v. Peak Technical Servs., 808 F. Supp. 500, 504 E.D. Va. 1992 (citation omitted).

In order to successfully defeat a motion for summary judgment, a nonmoving party cannot rely on mere belief or conjecturely the allegations and denials contained the pleadings". Dyle v. Sentry Ins., 877 F. Supp. 1002, 1005 (E.D. Va. 1995) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324(1986)). Rather, the nonmoving party must set forth specific facts through affidavits, depositions, interrogatories, or other evidence to show genuine issues for trial. Celotex, 477 U.S. at 324. When the nonmoving party fails to make a sufficient showing establishing an essential element of his case and he bears the burden of proof on that issue, "there is 'no genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 322; Anderson, 477 U.S. at 254.

III. DPV's MOTION FOR SUMMARY JUDGMENT

Plaintiff makes the following claims against the DPV: (1) Count I- Violations of the Voting Rights Act of 1965 and the Fifteenth Amendment; (2) Count II – Violations of Equal Protection Clause of the Fourteenth Amendment; and (3) Count III- Violations of the Plaintiff's Freedom of Expression and Association, Pursuant to the First and Fourteenth Amendments.

A. MUCH OF THE RELIEF REQUESTED BY PLAINTIFF IS NOW MOOT.

Federal courts are limited to hearing actual cases or controversies. U.S. Const., Art. III § 2, C1.1 "To qualify as a case fit for federal court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the Complaint is filed." Arizonians for Official English v. Arizona 520 U.S. 43, 67 (1997).

Defendant argues that the relief sought by Plaintiff is now moot as to the DPV. Defendants are correct as to the

following remedies: 1). George Schaefer has already been certified and sworn in; thus, the request to enjoin that process is now moot. 2) :The DPV did not certify the election results (Comp. ¶ 98), and thus is not a proper party to defend that certification before the Court. Thus, Plaintiff's request for a declaratory judgment invalidating the election is moot. 3). Further, the DPV does not have the authority to call or the responsibility to hold a special election and thus is not a proper party to contest an injunction requiring a special election.

Plaintiff does however seek two remedies that the Court could still grant. The Court could still issue a declaratory judgment that the DPV violated her constitutional rights. That question has not been resolved and can be litigated by the present parties. Secondly, the Court can still order that the costs of litigation be borne by the Defendants.

B. PLAINTIFF FAILED TO EXHAUST THE ADMINISTRATIVE REMEDIES AVAILABLE TO HER UNDER THE VIRGINIA DEMOCRATIC PARTY PLAN.

It is "a long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Holcomb v. Colony Bay Coal Co. 852 F. 2d 792 (4th Cir. 1988). The "exhaustion of remedies requirement" is not exclusive to a paradigm in which the legislatures delegate authority to administrative agencies to conduct hearings and provide relief. The Court of Appeals for the Fourth Circuit("Fourth Circuit") affirmed a grant of summary judgment against a doctor who failed to exhaust the remedies prescribed in a contract between him and a hospital. See Brooks v. Arlington Hosp. Ass'n, 850 F. 2d 191 (4th Cir. 1988). Here, the Plaintiff had an acceptable remedy available to her within the DPV, according to the Democratic State Party Plan("Plan"). (Exhibit 3 to the Defendant's Memorandum of Law in Support of its Motion for Summary Judgment, Doc. 64) The Plan details an appeal

process in Article 11. Id. Further, Article 5.6 allows any party "aggrieved by such alleged discrimination [racial, gender, age, etc.]" to file a complaint with the Secretary of the Steering Committee. Id. The investigation must be concluded within 30 days after the filing of the complaint. Id. Further, the Steering Committee must act to provide "such remedies, as it deems appropriate within 30 days from the conclusion of the investigation." Id. Further, Article 11 provides for a hearing in which Plaintiff could be heard and represented by counsel. Id.

Thus, Plaintiff could have exhausted her remedies in the DPV by the end of July, in time to file either her suit in Virginia Circuit Court (filed in September) or her suit in this Court (filed in December).

C. PLAINTIFF DOES NOT HAVE STANDING UNDER THE VOTING RIGHTS ACT OF 1965.

It is well-settled that unsuccessful candidates lack standing to sue under the Voting Rights Act of 1965. See Roberts v. Wamser, 883 F. 2d 617, 621 (8th Cir. 1989); see also McGee v. City of Warrensville Heights, 16 F. Supp. 2d 837, 845-46(N.D. Ohio 1998). In Roberts, an unsuccessful black candidate for the Democratic primary election for the office of President of the Board of Aldermen, filed suit against the Board of Election Commissioners under the Voting Rights Act, challenging certain practices. Id. at 618. The Court of Appeals for the Eighth Circuit ("Eighth Circuit") held that the plaintiff, as an unsuccessful candidate, did not have standing to sue under the Voting Rights Act. It said:

> We conclude that an unsuccessful candidate attempting to challenge election results does not have standing under the Voting Rights Act. Although the "aggrieved person" language might be stretched to include an unsuccessful candidate such as Roberts, we are unconvinced that Congress intended it to be stretched that far. The purpose of the Voting Rights Acts is to protect minority voters, not to give

unsuccessful candidates for state or local office a federal forum in which to challenge elections. Id. at 621.

The Eighth Circuit gave two reasons for its conclusion. First, it noted the divergence between the interests of an unsuccessful candidate and citizens trying to enforce their right to vote. Id. Second, the Eighth Circuit reasoned that Congress could not have provided standing for a defeated candidate through the Voting Rights Act, because to do so would allow federal courts to interfere with state and local elections, thus violating principles of federalism. Id.

In response to the DPV's argument, the Plaintiff attempts to characterize her position as that of both an unsuccessful candidate and a voter. The Plaintiff's position is untenable. At the May 27, 2004 hearing, the Court FOUND that the Complaint contains allegations that Plaintiff's suit is brought as an unsuccessful candidate.

Also, Plaintiff again attempts to distinguish that the Complaint contains allegations that Plaintiff's suit is brought as an unsuccessful candidate. 2

Also, Plaintiff again attempts to distinguish Roberts by claiming that she is suing under § 5

2The Plaintiff's claim as stated in Count I and her own admissions at the TRO hearing on December 30, 2003 suggest that the Plaintiff brings this action as an unsuccessful candidate, not a voter. At the TRO hearing, the Court directly asked the Defendant, "Are you bringing the action as a voter or as a candidate?" to which the Plaintiff responded, "The candidate." (Tr. Of December 30, 2003 Hr'g at 18). Further, in Paragraph 40 of the Complaint, the Plaintiff alleges, [The Plaintiff] has standing to bring this action, because she is a victim of race discrimination, an unsuccessful candidate in the election which was held on November 4, 2003..." (Compl. at ¶ 40)(emphasis added). This is consistent with the Plaintiff's allegations in Count I of the Complaint. It states, "Battle has a constitutional protective right, as a candidate for public office as white candidates under the Voting Rights Act of 1965, as amended." (Compl. at ¶ 113)(emphasis added). The Plaintiff further alleges, "The actions and conduct of these defendants, as alleged herein,

were racially motivated to discriminate against and to exclude African-Americans from the position of Clerk of the Norfolk Circuit Court." (Compl. at ¶ 115)(emphasis added). Plaintiff's belated attempt to recast her Complaint as that of a voter appears to be a recent fabrication designed to avoid prior court rulings. Based on the Plaintiff's own admission to the Court and her initial pleading, the Court FOUND that the Plaintiff makes her claim as an unsuccessful candidate, not a voter.
and §103; however, there is no reason to treat § 2 and 5 of the same statute differently for purposes of standing.

[Judge the following argument has not been presented by the Defendant other than their statement, "Even if the factual claims pled by White-Battle in support of her claims were true, she would fail nevertheless to state any cognizable cause of action against the DPVA under these theories of liability. Defendant's Memorandum, p.6.]

Even if the Plaintiff had standing under § 5, however, the Plaintiff has no claim under § 5, she would have to allege that "a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny" of preclearance. Allen v. State Bd. of Elections, 393 U.S. 544, 561 (1969). The Voting Rights Act is remarkably broad, applying to "any state enactment which altered the election law of a covered State in even a minor way." Morse, 517 U.S. at 204(quoting Allen v. State Bd. of Elections, 393 U.S. at 566-567). As explained in Lake v. State Bd. of Elections of N.C.:

In determining § 5 issues, a court must consider: (1) whether there was an enactment or administration; (2) of a "voting qualification or perquisite to voting or standard, practice or procedure with respect to voting" that is different from pre-1964 or the most recently precleared law; and (3) "whether the challenged alteration has the potential for discrimination."

798 F. Supp. 1199, 1205 (M.D.N.C. 1992)(internal citations omitted).

In Lake, the Court held that a court order extending voting hours on election day because of election irregularities was not a "change" in state requirements that required preclearance under § 5. Id. at 1205-06. The Plaintiff has

proffered that the Norfolk Democratic Committee violated Virginia state law § 24.2-510 by nominating Schaefer before May 9, 2003; yet a violation is an act or omission taken pursuant to pre-established laws and procedures, not a change in state laws and procedures. Thus, Plaintiff has not proffered facts that would support a claim under § 5 of the Voting Rights Act.

D. BATTLE PROFFERS NO EVIDENCE THAT WOULD SUPPORT HER § 1983 CLAIMS.

Battle proffers no evidence that she was denied equal protection of the law by the DPV because of her race. The evidence that has been proffered reveals that the DPV at worst sat by while the NDC violated state law regarding the timing of nominations, as well as local and state party rules. Even if the alleged action occurred. However, that action affected equally all other potential candidates than Schaefer, white and black.

Battle also alleges that the DPV violated her right to freedom of expression and association protected by the First Amendment.

She proffers no evidence, however, that would amount to a cognizable violation of a Constitutional right. Even if the Court were to find that a Constitutional right had been violated, the right would not be clearly established such that a reasonable official would be aware that he was violating it.

Jurisprudence concerning the First Amendment and elections, generally concerns either the freedom of association of voters and political parties, see generally, Anderson v. Celebreeze 103 U.S. 1564 (1983), California Democratic Party v. Jones, 530 U.S. 567 (2000), or the extent to which political contributions of voters or political expenditures of candidates might implicate a right to expression, see Buckley v. Valeo 96 S.Ct. 612(1976).

The Court has already FOUND that Battle is suing as a candidate and not a voter. See Order on June 29, 2004, Doc. 51. To the extent that case law addresses candidates'

First Amendment rights, this occurs in the context of campaign expenditures, see Valeo 96 S.Ct. at 612, or providing equal access to debates or equal time on public broadcasting stations, see 78 A. Jur. Proof of Facts 3d 1. No case law exists that affords a candidate the right to express herself in the role of a party's nominee. In fact, such a right would likely infringe on the rights of the party members as voters to express themselves through a candidate of their choice and to associate with a candidate of their choice.

Thus, Battle has proffered no evidence that would amount to a cognizable violation of a Constitutional right.

IV. NDC'S MOTION FOR SUMMARY JUDGMENT

Plaintiff makes the following claims against the DPV: (1) Count I- Violations of the Voting Rights Act of 1965 and the Fifteenth Amendment; and (3) Count III- Violations of the Plaintiff's Freedom of Expression and Association, Pursuant to the First and Fourteenth Amendments.

A. MUCH OF THE RELIEF REQUESTED BY PLAINTIFF IS NOW MOOT.

NDC did not raise any issue of mootness; however, the Court may raise issues of jurisdiction sua sponte. See Mt. Healthy City School Dist. Board of Educ. v. Doyle, 97 S. Ct. 572, 577 (1977). Thus, as explained in III.A., Plaintiff's request to enjoin the certification and swearing in of Schaefer, Plaintiff's request for a declaratory judgment invalidating the election, and Plaintiff request to issue an injunction requiring NDC to call or to hold a special election are all moot.

Plaintiff does however seek two remedies that the Court could still grant. The Court could still issue a declaratory judgment that NDC violated her constitutional rights and could still order that the costs of litigation be borne by the Defendants.

B. PLAINTIFF DOES NOT HAVE STANDING UNDER THE VOTING RIGHTS ACT OF 1965.

Plaintiff does not have standing to sue under the Voting Rights Act. See II.C.

C. BATTLE PROFFERS NO EVIDENVE THAT WOULD SUPPORT HER § 1983 CLAIMS.

Battle proffers no evidence that she was denied equal protection of the law by the NDC because of her race. The evidence that has bee proffered reveals that NDC at worst violated state law regarding the timing of nominations, as well as local and state party rules. Whatever proscribed action occurred, however, that action affected equally all other potential candidates than Schaefer, white and black. Further, as explained in III. D., Battle proffers no evidence that her First Amendment rights were violated

V. CONSIDERATIONS OF FEDERALISM AND SEPARATION OF POWER WEIGH AGAINST FEDERAL COURTS REVIEWING STATE ELECTION PROCEEDINGS.

Notably the Plaintiff did not seek relief in this Court until after the voters had spoken in an election in which she was on the ballot as an independent candidate. The nomination process of which she complains was completed in May, 2003 and the election was completed in November, 2003.

Federal district courts are courts of limited jurisdiction. While this Court generally has original jurisdiction over all civil actions arising under the Constitution of the United States, see 28 U.S.C. § 1331, principles of separation of powers and federalism prevent the Court from reexamining election results. Hutchinson v. Miller, 797 F. 2d 1279, 1286 (4th Cir. 1986). In making this decision, the Court finds persuasive the Fourth Circuit's decision in Hutchinson. In Hutchinson, the Fourth Circuit considered the appeal of unsuccessful candidates for public office who challenged the outcome of a general election based on alleged election irregularities. 797 F. 2d at 1279. The plaintiff's in Hutchinson alleged that "the election night totals were pre-determined by defendants, who then

conspired to cover up their activities." Id. at 1280. The plaintiff also alleged that "numerous irregularities occurred after the election, including improper handling of the ballots and release of exact returns prior to the canvass, and destruction of ballots that violated [state law]," Id. at 1281. The Fourth Circuit characterized the plaintiffs' constitutional claims as having been deprived of their right to candidacy. Id. at 1282.

At the outset, the Hutchinson court recognized "the significant duty of federal courts to preserve constitutional rights in the electoral process," but limited that responsibility to "the general application of laws and procedures, not the particulars of election disputes." Id. at 1283. Examples of subjects of federal court intervention are class-based restrictions on the right to vote, dilution of votes through malapportionment, and enforcing the Voting Rights Act to ensure equal voting rights regardless of race. Id. However, federal "circuit courts have uniformly declined to endorse action under § 1983 with respect to garden variety election irregularities." Id (quoting Griffin v. Burns, 570 F. 2d 1065, 1076 (1st Cir. 1978)). The Fourth Circuit further recognized that the "courts, mainly considering disputes involving state election, have declined to interfere because of the constitutional recognition that states are primarily responsible for their own elections, and that alternative remedies are adequate to guarantee the integrity of the democratic process. Hutchinson, 797 F. 2d at 1283 (internal quotations omitted).

"[T]he constitution anticipates that the electoral process is to be largely controlled by the states and reviewed by the legislature." Id. Moreover, the Hutchinson court decided to refrain from considering the particulars of a disputed election, reasoning:

> To do otherwise would be to intrude on the role of the states and the Congress, to raise the possibility of inconsistent judgments concerning elections, to erode the finality of results, to give candidates incentives to

> bypass the procedures already established, to involve federal courts in the details of state-run elections, and to constitute the jury as well as the electorate as an arbiter of political outcomes. Id. at 1285.

The Fourth Circuit worried that it was not a jury's proper responsibility to review the outcome of an election, or for a court to sit in review of a jury's determination. Id. at 1286. The Hutchinson court conceded that elections are not free from error, but also held that federal courts are not the place to remedy those potential errors. The court stated:

> We further believe that federal courts are ill-equipped to monitor the details of elections and resolve factual disputes born of the political process. As one court has noted, "were we to embrace plaintiffs' theory, this court would henceforth be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, election cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law. Powell v. Power, 436 F. 2d 84, 86(2d. Cir 1970). Elections are regrettably, not always free from error. Voting machines malfunction, registrars fail to follow instructions, absentee ballots are improperly administered, poll workers become over-zealous, and defeated candidates are, perhaps understandably, inclined to view these multifarious opportunities for human error in a less than charitable light. Quite apart from the serious problems of federalism and separation of powers problems raised by these tasks, we find sifting the minutiae of post-election accusations better suited to the factual review at the administrative and legislative level, where an awareness of the vagaries of politics informs the judgment of those called upon to review the irregularities that inevitable in elections staffed largely by volunteers. See Hennings v. Grafton, 523

> F.2d 861, 865 (7th Cir. 1975). To ask a jury to undertake such tasks, moreover, is to risk the intrusion of political partisanship into the courtroom, where it has no place.

Hutchinson, 797 F.2d at 1286-87.

This Court is bound by the decision in Hutchinson and the underlying policies. The policy of federalism is especially persuasive in this case, in which the Plaintiff sought the position of Clerk of the Circuit Court of the City of Norfolk. Virginia law provides unsuccessful political candidates a mechanism to contest election results. See Va. Code Ann. § 24.2-806. Virginia law allows an unsuccessful candidate to contest the election outcome based on "objections to the conduct or results of the election accompanied by specific allegations which, if proven true, would have a probable impact on the outcome of the election." Va. Code Ann § 24.2-807. In the case at bar, the Plaintiff's remedy was to contest the election in the Circuit Court for the City of Norfolk. Plaintiff attached a decree from the Circuit Court, CH 03-2074, November 20, 2003. See Exhibit E to Plaintiff's Memorandum in Opposition to Motion for Summary Judgment of the Democratic Party of Virginia. In that decree, the Circuit Court dismissed her complaint, in which she challenged the election under Virginia Code 24.2-807 *et seq.* and sought a declaratory judgment that the nomination of Schaefer was illegal. Id. Like the Hutchinson court, this Court believes that the state circuit court, not the federal district court, was the proper court in which unsuccessful candidates should pursue election contests, absent "instances of patent unfairness that erode [ ] the democratic process." See Hutchinson 797 F. 2d. at 1283-84, 1287 (internal citations omitted). Accordingly, the Court GRANTS the DPV's Motion for Summary Judgment on Counts I, II, and III. The Court also GRANTS the NDC's Motion for Summary Judgment on Counts I, II, and III.

VI. CONCLUSION

Although the Plaintiff has made a prima facie showing of irregularities in the nominating process for the Democratic candidate, the position which she sought, the Plaintiff has proffered no facts which establish a federal cause of action. Accordingly, the Court GRANTS the NDC's Motion for Summary Judgment on all claims. The Court also GRANTS the DPV's Motion for Summary Judgment on all claims. The Clerk is REQUESTED to mail a copy of this Order to the Plaintiff and all counsel of record. It is so ORDERED.

/S/ HENRY COKE MORGAN, JR.

HENRY COKE MORGAN, JR.

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
November 10, 2004

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

SHERRY WHITE-BATTLE
Plaintiff,

v. CIVIL ACTION NO. 2:03CV897

DEMOCRATIC PARTY OF
VIRGINIA, et al.,
Defendants.

ORDER

This matter is before the Court on Plaintiff Sherry White-Battle's("Plaintiff") Motion for Preliminary Injunction(Document No. 5). Defendant Norfolk Electoral Board's Motion for Summary Judgment (Document No. 9), Defendant George Schaefer's Motion for Summary Judgment (Document No. 15), and Plaintiff's Motion for Default Judgment against the Democratic Party of Virginia (Document No. 28). On May 27, 2004, the Court heard argument on the Motions for Summary Judgment and the Motion for Default Judgment. For the reasons set forth in this Order, the Court **DENIES** Plaintiff's Motion for Default Judgment against the Democratic Party of Virginia.

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On December 24, 2003, the Plaintiff filed a Complaint in this Court against the Democratic Party of Virginia("The Party"), the Norfolk City Democratic Committee("the Committee"), George Schaefer ("Schaefer"), and the Norfolk Electoral Board ("the Board"). (Document No. 1). The Plaintiff alleges that this Court has federal question jurisdiction to consider violations of her

First, Fourteenth, and Fifteenth Amendment rights, as well as Sections Five and Ten of the Voting Rights Acts of 1965, 42 U.S.C. § 1983, and 28 U.S.C. §§ 1343, 2201, and 2202. (Compl. At ¶ 9).

This action arises out of the Plaintiff's failed attempts to become the Democratic nominee in the election for the Clerk of the Norfolk Circuit Court(hereinafter, "Clerk"). On or about May 16, 2003, the Plaintiff filed a Certification of Candidate Qualification and addition papers with the General Registrar of the City of Norfolk, in order to qualify to be included on the November, 2003 ballot for Clerk. (Compl. At ¶ 11). The Plaintiff believed that the Committee would hold a caucus on May 31, 2003 to select a Clerk nominee. (Compl. ¶ 13). On or about May 16, 2003, the Plaintiff learned that the Committee's nomination period ended on March 28, 2003, and as a result, the Plaintiff could not become the Committee's nominee. (Compl. At ¶¶ 15-16, 19). The Plaintiff also learned that the Committee selected Schaefer as its nominee for the Clerk's election in the November, 2003 Commonwealth General Election. (Compl. At ¶¶ 16, 19). Schaefer had been an active member of the Republican Party, having previously served as the Chairman of the City of Norfolk Republican Party. (Compl. At ¶ 17). The Plaintiff contacted Barbara Klear ("Klear"), Secretary for the Committee, who told the Plaintiff that there was no publication of a notice of caucus and did not state the date or location of the caucus. (Compl. At ¶ 19).

The Plaintiff objects to the selection process used to nominate Schaefer as the Committee nominee. First, the Plaintiff alleges that Schaefer's selection violated Va. Code Ann. § 24.2-510, because nominee were to be selected prior to May 9, 2003, exactly 32 days before the primary date of June 10, 2003. (Compl. At ¶ 37). Second, the Plaintiff alleges that the Committee's selection meeting did not comply with Section 9.1 of the Virginia Democratic Party Plan or Article IX B of the Committee's By-Laws, because the notice, if any, was not published in a newspaper of

general circulation in the City of Norfolk, including the date, time, agenda, place, and address of the caucus/meeting. (Copml. At ¶ 38).
Section 5, which requires the Attorney General's preclearance of voting qualifications, practices and procedures.

The plaintiff's position is untenable. Despite her argument to the contrary, the Defendant asserts her claim under the Voting Rights Act as an unsuccessful candidate , not a voter. At the TRO hearing on December 30, 203, the Court directly asked the Defendant, "Are you bringing the action as a voter or as a candidate?" to which the Plaintiff responded, "The candidate." (Tr. of December 30, 2003 Hr'g at 18). Moreover, the Court FINDS that the Complaint contains allegations that Plaintiff's suit is brought as an unsuccessful candidate. In Paragraph 40 of the Complaint, the Plaintiff alleges, "[The Plaintiff] has standing has standing to bring this action, because she is a victim of race discrimination, an unsuccessful candidate in the election which was held on November 4, 2003..." (Compl. at ¶ 40) (emphasis added). This is consistent with the Plaintiff's allegations in Count I of the complaint. It states, "Battle has a constitutional protective right, as a candidate for public office, to participate in the political process and to have equal opportunity to run for public office as white candidates under the Voting Rights Act of 1965 as amended." (Compl. at ¶ 113)(emphasis added). The Plaintiff further alleges, "The actions and conduct of these defendants, as alleged herein, were racially motivated to discriminate against and to exclude African-Americans from the position of Clerk of the Norfolk Circuit Court," (Compl. at ¶ 115)(emphasis added). Plaintiff's belated attempt to recast her Complaint as that of a voter appears to be a recent fabrication designed to avoid prior court rulings. Based on the Plaintiff's own admission to the Court and her initial pleading, the Court FINDS that the Plaintiff makes her claim as an unsuccessful candidate not a voter.

Moreover, the Plaintiff's attempt to characterize her Voting Rights Act claim as one pursuant to the preclearance requirements of Section 5 also fails. In order for the Plaintiff to state a claim under Section 5, she would have to allege that "a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny" of preclearance. Allen v. State Bd. of Elections, 393 U.S. 544, 561 (1969). As explained in Lake v. State Bd. of Elections of N.C.:

In determining § 5 issues, a court must consider: (1) whether there was an enactment or administration; (2) of a "voting qualification or perquisite to voting or standard, practice or procedure with respect to voting" that is different from pre-1964 or the most recently precleared law; and (3) "whether the challenged alteration has the potential for discrimination."

798 F. Supp. 1199, 1205 (M.D.N.C. 1992)(internal citations omitted). In Lake, the COurt held that the a court order extending voting hours on election day because of election irregularities was not a "change" in state requirements that required preclearance under Section 5. Id. at 1205-06. In the case at bar, the Plaintiff neatly characterized the nature of her claims as follows:

The gravamen of Battle (sic) claims against the Board in Count I, II and III is that the Board knowingly accepted certification fro (sic) the Committee that Schaefer was the nominee of the Committee before May 9, 2003; it knowingly did not properly test the voting machines, so that they could show at all times during the election how many person (sic) have voted; and it did not count al of hand ballots handed out at Zion Grace.

(P.I.'s Mem. in Opp'n at 15). None of the Plaintiff's three complaints involved a "change" in state laws, standards, or procedures. TO the contrary, all of the Plaintiff's complaints involve alleged actions or omissions taken pursuant to pre-established laws and procedures. For this reason, the Court FINDS that the Plaintiff has not alleged a claim under Section 5 of the Voting Rights Act. For the reasons discussed

in this section, the Court GRANTS the Board's Motion for Summary Judgment as to Count I.

2. CONSTITUTIONAL CLAIMS-EQUAL PROTECTION, FREEDOM OF EXPRESSION AND ASSOCIATION

In Counts II and III, the Plaintiff alleges constitutional violations of equal protection under the Fourteenth Amendment(Count II) and violations of her freedom of expression and association under the First and Fourteenth Amendments (Count III). The Plaintiff's claims are grounded on the following factual allegations: (1) the voting machines malfunctioned; (2) Plaintiff's representatives were not allowed into two polling locations during the vote counting; (3) votes cast after 4:00 p.m. were not counted; (4) paper ballots cast at the Zion Grace precinct were not accounted for; and (5) polling records were not made available to the Plaintiff after the election. Even assuming that the Plaintiff's allegation are true, this Court will not entertain such claims in the absence of instances of "patent and fundamental unfairness" that "erode [] the democratic process." Hutchinson v. Miller 797 F.2d 1279 (4th Cir. 1986)(quoting Hendon v. North Carolina State Bd. of Elections, 710 F.2d 177, 182(4th Cir. 1983).

Federal district courts are courts of limited jurisdiction. While this Court generally has original jurisdiction over all civil actions arising under the Constitution of the United States, see 28 U.S.C. § 1331, principle of separation of powers and federalism prevent the Court from reexamining election results. Hutchinson, 797 F.2d at 1286. In making this decision, the Court finds persuasive the Fourth Circuit's decision in Hutchinson. In Hutchinson, the Fourth Circuit considered the appeal of unsuccessful candidates for public office who challenged the outcome of a general election based on alleged election irregularities. 797 F.2d at 1279. The plaintiffs in Hutchinson alleged that "the election night totals were pre-determined by defendants, who then conspired to cover up their activities."

Id. at 1280. The plaintiffs also alleged the "numerous irregularities occurred after the election, including improper handling of the ballots and release of exact returns prior to the canvass, and destruction of ballots that violated [state law]." Id. at 1281. The Fourth Circuit characterized the plaintiffs' constitutional claims as having been deprived of their right to candidacy. Id. at 1282.

At the outset, the Hutchinson court recognized "the significant duty of federal courts to preserve constitutional rights in the electoral process," but limited that responsibility to "the general application of laws and procedures, not the particulars of election disputes." Id. at 1283. Examples of subjects of federal court intervention are class-based restrictions on the right to vote, dilution of votes through malapportionment, and enforcing the Voting Rights Act to ensure equal voting rights regardless of race. Id. However, "circuit courts have uniformly declined to endorse action under § 1983 with respect to garder variety election irregularities." Id.(quoting Griffin v. Burns, 570 F.2d 1065, 1076 (1st Cir. 1978)). The Fourth Circuit further recognized that the "courts, mainly considering disputes involving state elections, have declined to interfere because of the constitutional recognition that states are primarily responsible for their own elections, and that alternative remedies are adequate to guarantee the integrity of the democratic process. Hutchinson, 797 F. 2d at 1283 (internal quotations omitted).

"[T]he constitution anticipates that the electoral process is to be largely controlled by the states and reviewed by the legislature." Id. Moreover, the Hutchinson court decided to refrain from considering the particulars of a disputed election, reasoning:

To do otherwise would be to intrude on the role of the states and the Congress, to raise the possibility of inconsistent judgment concerning elections, to erode the finality of results, to give candidates incentives to bypass the procedures already established, to \involve federal courts in

the details of state-run elections, and to constitute the jury as well as the electorate as an arbiter of political outcomes. Id. at 1285. The Fourth Circuit worried that it was not a jury's proper responsibility to review the out come of an election, or for a court to sit in review of a jury's determination. Id. at 1286. The Hutchinson court conceded that elections are not free from error, but also held that the federal courts are not the place to remedy those potential errors. The court stated:

We further believe that federal courts are ill-equipped to monitor the details of elections and resolve factual disputes born of the political process. As one court has noted, "were we to embrace plaintiff's theory, this court would henceforth be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, election cards, vote tallies, and certificates of election for all manner of error and

insufficiency under state and federal law. Powell v. Power, 436 F.2d 84, 86 (2d) Cir. 1970). Elections are, regrettably, not always free from error. Voting machines malfunction, registrars fail to follow instructions, absentee ballots are improperly administered, poll workers become over-zealous, and defeated candidates are, perhaps understandably, inclined to view these multifarious opportunities for human error in a less than charitable light. Quite apart from the serious problems of federalism and separate on of powers problems raised by these tasks, we find sifting the minutiae of post-election accusations better suited to the factual review at the administrative and legislative level, where an awareness of the vagaries of politics informs the judgment of those called upon to review the irregularities that are inevitable in elections staffed largely by volunteers. See Hennings v. Grafton, 523 F.2d 861, 865 (7th Cir. 1975). To ask a jury to undertake such tasks, moreover, is to risk the intrusion of political partisanship into the courtroom, where it has no place. Hutchinson, 797 F.2d at 1286-87.

The Court agrees with the decision in Hutchinson and the underlying policies. The policy of federalism, is especially persuasive in this case, in which the Plaintiff sought the position of Clerk of the Circuit Court of the City of Norfolk. Virginia law provides unsuccessful political candidates a mechanism to contest election results. See Va. Code Ann. § 24.2-806 et seq. Section 24.2-806 grants jurisdiction over an election contest to "the circuit court of the county or city in which the challenged candidate resides." Va. Code Ann. § 24.2-806. Virginia law allows an unsuccessful candidate to contest the election outcome based on "abjections to the conduct or results of the election accompanied by specific allegations which, if proven true, would have a probable impact on the outcome of the election." Va. Code Ann. § 24.2-807. In the case at bar, the Plaintiff's remedy is to contest the election in the Circuit Court for the City of Norfolk. It appears from the Plaintiff's Complaint that she attempted to file some type of civil action in the Circuit Court, but it is unclear whether it was a formal contest of the election. (Compl. at ¶¶ 107-110). Like the Hutchinson court, this Court believes that the state circuit court, not the federal district court, is the proper court in which unfairness candidates should pursue election contests, absent "instances of patent unfairness that erode[] the democratic process." See Hutchinson 797 F. 2d at 1283-84, 1287 (internal citations omitted). In the case at bar, there is no evidence that the alleged election errors, if true, are anything more than "the irregularities that are inevitable in elections staffed largely by volunteers." Id. at 1287. Accordingly, the Court GRANTS the Board's Motion for Summary Judgment on Counts II and III.

C. SCHAEFER'S MOTION FOR SUMMARY JUDGMENT

The next motion before the Court is Schaefer's Motion for Summary Judgment. The Plaintiff makes the following claims against Schaefer: (1) Count I-Violations of the Voting Rights Act of 1965 and the Fifteenth

Amendment; (2) Count II-Violations of the Equal Protection Clause of the Fourteenth Amendment, and (3) Count III-Violations of the Plaintiff's Freedom of Expression and Association, Pursuant to the First and Fourteenth Amendments.

1. VOTING RIGHTS ACT OF 1965

With respect to the Plaintiff's claim under the Voting Rights Act of 1965, Schaefer makes the same argument as the Board that the Plaintiff has no standing, as an unsuccessful candidate, under the Voting Rights Act of 1965. For the reasons discussed in Section III(B)(1), supra, the Court FINDS that the Plaintiff makes her claim as an unsuccessful candidate not a voter and GRANTS Schaefer's Motion for Summary Judgment on Count I.

2. CONSTITUTIONAL VOILATIONS PURSUANT TO 42 U.S.C. § 1983

In Counts II and III of the Complaint, the Plaintiff alleges constitutional violations of her rights under the First and Fourteenth Amendments. In Count II, the Plaintiff alleges that she was "denied equal protection of the law by the defendants because of her race." (Compl. at ¶ 118). In Count III, she alleges that the defendants' actions violate her rights to freedom of expression and association, as provided by the First and Fourteenth Amendments. (Compl. at ¶¶ 122-123). Title 42, United States Code, Section 1983 allows individuals to bring a civil action against persons who deprive others of the rights, privileges, or immunities secured by the Constitution and laws. It provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

42 U.S.C. § 1983.

Schaefer contends that he cannot be liable for the alleged constitutional violations in Counts II and III because: (1) he was not acting under the color of state law; and (2) the Plaintiff fails to state facts to support any claim that Schaefer acted to deprive her of any right to secured by the laws and/or Constitution of the United States.

In response to Schaefer's Motion for Summary Judgment, the Plaintiff attempts to link Schaefer to the allegedly wrongful acts of the Committee through a theory of conspiracy. The Plaintiff's theory requires the Court to accept the following three propositions: (1) the Committee and its officials are an arm of the State, and therefore, act under the color of low, see Morse, et al. v. Republican Party of Virginia et al., 517 U.S. 186, 197 (1996); (2) Schaefer is part of a conspiracy with two Committee officials, Christopher and Klear, who acted to deny her equal protection and freedom of speech and association; and (3) once the conspiracy is established, a private individual can be held "under the color of law" when state officials are part of the conspiracy, see Adickes v. S.H. Kress & Co., 398 U.S. 144, 155 (1970).

Even assuming, without deciding, that the Committee is an arm of the State acting under the color of law, the Plaintiff's claims in Counts II and III fail because the Plaintiff failed to allege facts supporting Schaefer's involvement in a conspiracy with Committee members and because Schaefer was not acting under the color of law at the time of the alleged events. First, the Plaintiff failed to allege any facts supporting her contention that Schaefer conspired with Christopher and Klear to violate the Plaintiff's constitutional rights. Instead, the Plaintiff claims that the Committee failed to follow its own procedures and the Virginia Democratic Party Plan for providing notice and timing of the candidate selection process. (Compl. ¶¶ 15-16, 19, 20, 23, 25-26, 29). Moreover, the Plaintiff alleges that the Committee's selection of Schafeer preceded the date

prescribed by Va. Code Ann. § 24.2-510. Compl. at ¶ 37). The only action Schaefer is alleged to have taken is his acceptance of the Democratic nomination for Clerk. (Compl. ¶¶ 16, 19). The Court FINDS that the Plaintiff has failed to allege facts sufficient to link Schaefer to any conspiracy alleged against the Committee, Party, or individual members Christopher or Klear.

Counts II and III also fail against Schaefer because he was not acting under the color of law at the time of the alleged events. During the time in question, Schaefer served as a Chief Deputy in the office of the Commonwealth's Attorney for the City of Norfolk, Virginia. (Schaefer Aff. at ¶ 2). Despite Schaefer's position within the local government, his alleged actions underlying the Plaintiff's claims did not involve his position as Chief Deputy. Schaefer's acceptance of the Democratic nomination for Clerk was taken in his private capacity. Even so, the Supreme Court has recognized four circumstances when a private party may be deemed a state actor for purposes of § 1983 liability:

(1) when the state has coerced the private actor to commit an act that would be unconstitutional if done by the state; (2) when the state has sought to evade a clear constitutional duty through delegation to a private actor; (3) when the state has delegated a traditionally and exclusively public function to a private actor; or (4) when the state has committed an unconstitutional act in the course of enforcing a right of a private citizen.

Mentavlos v. Anderson, 249 F.3d 301, 313 (4th Cir 2001)(quoting Andrews v. Federal Home Loan Bank, 998 F.2d 214, 217 (4th Cir. 1993)). In the case at bar, Schaefer's alleged relationship with the Committee and its members does not fit into any of the recognized exceptions when a private party may be deemed a state actor for purposes of § 1983 liability. Accordingly, the Court FINDS that Schaefer was not acting under the color of law. Schaefer's Motion for Summary Judgment on Counts II and III is GRANTED.

D. PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

The final motion before the Court is Plaintiff's Motion for Default Judgment against the Party. (Document No. 28). The Plaintiff contends that her service of the Summons and Complaint upon Christopher, an officer and member of the Party's Central and State Steering Committees, was sufficient service pursuant to Va. Code Ann. § 8.01-305, which provides that process against an unincorporated association may be served on any officer, trustee, director, staff member or other agent. In response, the Party contends that Christopher is not a proper agent for service, and states that at the time of filing its Response in Opposition, it had not received a copy of the Plaintiff's Complaint. Based on the Party's representations to the Court that the Party had not seen a copy of the Complaint prior to the hearing, the Court DENIES Plaintiff's Motion for Default Judgment.

IV. CONCLUSION

The Court DENIES Plaintiff's Motion for Preliminary Injunction. The Court GRANTS the Board's Motion for Summary Judgment on all claims. The Courts GRANTS Schaefer's Motion for Summary Judgment on all claims. The Court DENIES Plaintiff's Motion for Default Judgment against the Party. At the hearing on May 27, 2004, the Curt ordered the Party to answer the Plaintiff's Complaint within eleven (11) days, as well as to file any motions from the Committee within eleven (11) days. Certain pleadings have since been filed, though arguably not in a timely manner.

The Clerk is REQUESTED to mail a copy of this Order to the Plaintiff and all counsel of record.

It is so ORDERED

/S/ Henry Coke Morgan, Jr.
HENRY COKE MORGAN, JR.
UNITED STATES DISTRICT JUDGE
Norfolk, Virginia
June 24, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

SHERRY WHITE- BATTLE,
PLAINTIF,

V. **Civil Action No. : 2:03CV897**

DEMOCRATIC PARTY OF VIRGINIA, ET AL.,

DEFENDANTS.

ORDER

This matter is before the Court on Plaintiff Sherry White- Battle's Motion for Leave to Amend he Complaint, Doc. 43, filed June 15, 2004.

The Motion for Summary Judgment by all Defendants haven been **Granted**. See Order, entered June 29, 2004, Doc. 51, and Order 79, entered November 13, 2004.

The Court has reviewed the Plaintiff's Motion for Leave to Amend the Complaint, Doc. 43, filed June 15, 2004, and the memoranda submitted supporting or opposing the motion.

The court **DENIES** Plaintiff leave to amend the complaint.

The Clerk is **REQUIRED** to mail a copy of this Order to t he Plaintiff and all counsel of record.

It is so **ORDERED**.

/s/ Henry Coke Morgan,
HENRY COKE MORGAN, JR.
UNITED STATES DISTRICT JUDGE
Norfolk, Virginia
November 16, 2004